

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DATABASE SERVICE
MANAGEMENT, INC., a New Jersey
corporation,

Plaintiff,

vs.

BEEHIVE TELEPHONE COMPANY,

Defendant.

Civil No. 2:96-CV-188J

ORDER

The plaintiff, Database Service Management, Inc. ("DSMI"), commenced the instant action against Beehive Telephone Company, Inc. ("Beehive") on March 1, 1996. On June 6-7, 1996, Beehive answered, counterclaimed, and filed a Motion for Temporary Restraining Order and Preliminary Injunction, which was heard by this Court on June 13, 1996. At that time, the Court ordered that DSMI restore service to Beehive on 56 toll-free telephone numbers which had been disconnected beginning May 29, 1996, and that DSMI hold up to 10,000 additional toll-free numbers pending further order of the Court.

The parties filed additional motions concerning the counterclaim and its amendment, and the court conducted a series of status conferences concerning this matter, both in an effort to resolve the form of written order embodying the preliminary relief granted in June 1996, and to determine what issues remained to be decided.

On March 2, 1998, commencing at 9:30 a.m., the Court held another status conference in this case. The status conference was convened by the Court pursuant to Fed. R. Civ. P. 16,

73

FILED
SEP 10 1996
BY:
CLERK OF COURT

with notice to counsel, for the purpose of considering and ruling upon the matters pending in this proceeding. Floyd A. Jensen appeared on behalf of DSMI, and Alan L. Smith appeared on behalf of Beehive. Prior to the hearing, the Court had thoroughly reviewed the file in this case, and considered all prior written submissions of the parties, as well as the factual representations, evidentiary presentations and oral arguments of counsel. After discussion with counsel, the Court concluded that no issues remained that are appropriate for adjudication in this forum; DSMI's claim for payment had been satisfied by the payment actually made, and additional issues raised by Beehive's amended counterclaim are more appropriately determined by the FCC.

An additional hearing respecting the form of order was held by the Court, after notice to counsel for the parties, on April 3, 1998. At that time counsel for Beehive was directed to revise and resubmit a proposed form of final order. Counsel for Beehive submitted a proposed order on June 10, 1998, and on June 15, 1998, counsel for DSMI filed objections to the proposed order. Those objections were heard by the court on July 8, 1998.

I

Plaintiff's complaint sought payment from defendant of \$48,879.95 in charges under the Federal Communications Commission ("FCC") tariff applicable to certain services received by Beehive prior to May 1994. The Court finds, upon a review of the record in this matter, and after colloquy with counsel for the parties, that defendant has paid these charges at least through April 1994, albeit these payments were made under protest and with a reservation of rights pursuant to the claims in the amended counterclaim on file with the Court.

Any claim plaintiff may have for payment of additional amounts purportedly due for the

period May 1994 through May 1996 was not pleaded in plaintiff's complaint; nor did plaintiff at any time seek leave of this court to amend its pleadings to incorporate such a claim.¹ That claim, referred to in writing for the first time in plaintiff's objections to the proposed form of final order, is simply not here, and may be prosecuted by plaintiff in a separate judicial or administrative proceeding.²

II

Counts one through five of Beehive's amended counterclaim raise a variety of issues respecting the FCC tariff noted above. The Court finds that, because these counts of the amended counterclaim raise technical issues of federal communications law, any decisions respecting these issues should be made by the FCC which has the expertise and experience needed to make them. Accordingly, these claims should be dismissed without prejudice to their assertion in a proceeding conducted before that agency.

Count six of the amended counterclaim raises a matter of tariff interpretation which is non-technical in nature, involving questions of notice and review prior to action taken under the aegis of the tariff. Count seven raises an issue of procedural due process under the Fifth

¹ Counsel for DSMI commented at the April 21, 1997 hearing that "if Beehive was a RespOrg at the time of these number disconnections and was entitled to have those numbers on that basis, then it would still owe DSMI about \$180,000 in unpaid charges under the tariff, because it didn't pay anything from April of '94 to May of '96." Transcript of Hearing, dated April 21, 1997, at 4:20-25 (Mr. Jensen). Nothing was done thereafter, however, to add any such claim by formal amendment of DSMI's complaint.

² Plaintiff's written objections filed June 15, 1998 assert that "[t]he conclusion that Beehive has fully paid amounts owing to DSMI is not supported by any evidence." Objection to Proposed Order and Judgment, filed June 15, 1998 (dkt. no. 69), at 2 ¶5. Yet counsel acknowledged in open court that the \$48,879.95 sought in DSMI's complaint had been paid—a representation reaffirmed at the July 8 hearing on DSMI's objections. See Transcript of Hearing, dated July 8, 1998, at 3:8-17. Counsel for Beehive points to Exhibit 5 and testimony at page 25 of the June 13, 1996 preliminary injunction hearing transcript, as well as subsequent affidavits, including one by Mr. Wayne McCulley, filed September 27, 1996 (dkt. no. 35), as evidence of Beehive's payment of the amount claimed in DSMI's complaint. Thus it appears to be without substantial dispute that the \$48,879.95 prayed for in the complaint was paid by Beehive and accepted by DSMI.

Amendment to the United States Constitution.³ The gist of these counts of the amended counterclaim is that the plaintiff disconnected certain toll-free telephone numbers previously allocated to Beehive without giving notice and without permitting a fair review of the matter in controversy before the disconnection occurred. As noted above, however, the asserted basis for the disconnection—nonpayment by Beehive—has been vitiated by Beehive's subsequent tender of the amount claimed to be due and the acceptance of same by the plaintiff. Beehive in effect has redeemed the telephone numbers by curing the default, *i.e.*, non-payment of the tariff charges, which led to disconnection in the first instance. For all of these reasons, the Court finds that it is proper and just for the plaintiff DSMI to restore to defendant Beehive the use of all of those telephone numbers earlier allocated to Beehive,⁴ at least pending further action before the FCC, and that the Court need not decide the notice and review questions raised by Beehive's sixth claim.

III

Plaintiff DSMI objected to Beehive's proposed form of final order on the grounds, *inter alia*, that Beehive is not entitled to judgment on its amended counterclaim because it never moved for judgment and "DSMI has had no opportunity to conduct discovery or to present evidence relative to the Amended Counterclaim" and that DSMI had inadequate notice of the Court's intention to dispose of the balance of the proceeding following the granting of

³ Remembering that the Due Process Clause addresses governmental rather than private conduct, the governmental action at issue under count VII remains unclear.

⁴ At an earlier hearing in this proceeding, the Court ordered DSMI to restore use of certain of these numbers to Beehive. It is the understanding of the Court, after a colloquy with counsel for the parties, that this earlier order has been complied with by DSMI.

Beehive's motion for preliminary injunction. DSMI further objected that its complaint should not be dismissed without an adjudication of its claims for interest and costs.

Fed. R. Civ. P. 16 empowers a federal district court to expedite the disposition of any civil action and address the formulation and simplification of the issues "[a]t any conference under this rule," which this court construes to mean any pretrial status and scheduling conference, not merely the hearing calendared as a "Final Pretrial Conference." The relief sought by plaintiff DSMI in its complaint was simple, straightforward, and was in fact obtained by DSMI from Beehive without court intervention.

That being so, the question necessarily arises: what remains in controversy? Upon inquiry, it appeared that nothing remained in controversy concerning the plaintiff's complaint. At that point, Beehive's amended counterclaim remained pending, but the court was persuaded that the issues raised in that pleading which had not already been determined by events (the payment of money owed under the tariff) were best raised before the administrative agency having primary authority and expertise in the field of toll-free telephone numbers—the Federal Communications Commission. DSMI had urged as much in its motion to dismiss Beehive's counterclaim, previously argued, and the court remains persuaded that this view is well taken.

Counsel for DSMI complains of a lack of opportunity to conduct discovery or present evidence concerning Beehive's amended counterclaim, but neither in writing or in open court has counsel made any proffer concerning those facts or issues counsel believes require discovery or presentation of proof in this court, in contrast to the FCC. This court has not adjudicated the claims raised in Beehive's counterclaim beyond attempting to restore the status quo *ca.* May 29, 1996, when DSMI began to disconnect toll-free numbers allocated to Beehive

because of non-payment under the tariff. The rationale is simple: if a default in payment is cured, those rights of user in what is ostensibly a "public resource" which were interrupted for non-payment should be restored.

In this action, DSMI sought payment of amounts owing, and payment has been received. Whether Beehive is ultimately entitled to use of 56, or 120, or 2,000, or 10,000 toll-free telephone numbers seems to be a question better resolved elsewhere.

Being fully advised in the premises, the Court now rules as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Because the relief sought in the complaint has been obtained by the plaintiff, the complaint properly should be and hereby is **DISMISSED WITH PREJUDICE**.

2. Counts one through five of the amended counterclaim of the defendant are **DISMISSED WITHOUT PREJUDICE** so that either defendant or plaintiff may renew these aspects of the controversy between the parties before the FCC, if such renewal is desired by either of them.

3. Excepting the numbers which were embraced in the earlier directive of the Court, and which already have been restored to defendant Beehive, plaintiff DSMI forthwith shall restore all telephone numbers which are the subject of this proceeding to the defendant Beehive.⁵

4. Plaintiff's objections to the entry of a final order in this matter are **OVERRULED**.

Within ten (10) days of the entry of this order, DSMI may file any application it wishes to


⁵ Plaintiff DSMI and defendant Beehive should cooperate with each other to the end that this restoration of numbers may occur as expeditiously as possible, so that the numbers may be put into service, becoming useable by defendant Beehive, as quickly as practicable.

make concerning any claim it asserts for interest on the \$48,879.95 sought in its complaint.

Each party shall bear its own costs in this proceeding.

DATED this 13th day of July, 1998.

BY THE COURT:



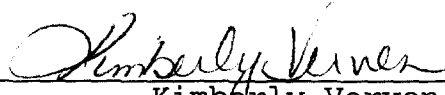
BRUCE S. JENKINS
United States Senior District Judge

CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 27th day of July, 1998, sent by first class U.S. mail copies of the foregoing REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION to the following:

Mark C. Rosenblum, Esquire
Peter Jacoby, Esquire
Jodie Donovan-May, Esquire
AT&T
295 North Maple Avenue, Room 3250J1
Basking Ridge, New Jersey 07920

*Ms. Josephine Simmons
Tariff and Price Analysis Branch
Federal Communications Commission
1919 M Street, N. W., Room 518
Washington, D. C. 20554



Kimberly Verven

* Via Hand Delivery